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No. 03-1717

AUG 18 2004

IN THE

Supreme Court of the United States

BRODERICK JONES,

Petitioner,

v.

REGINALD WILEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Respondent acknowledges that this case presents important and recurring questions on which the circuits have divided, and urges plenary review. Respondent, however, continues to seek plenary review of his own petition (No. 03-1687) without acknowledging the host of problems that infect that petition. Moreover, respondent understates the significance of the intervening decision of this Court in *Nelson v. Campbell*, 124 S. Ct. 2117 (2004), which, at a minimum, mandates that the court of appeals' decision be vacated and this case be remanded to that court for reconsideration.

1. Respondent acknowledges that the meaning of the decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), for Fourth Amendment claims has produced "a split among the circuits." Resp. Br. 14. He also acknowledges that "the

lower federal courts have followed different approaches in applying *Heck* to claims brought by persons, like respondent, who were never convicted of an offense." *Id.* at 13 (footnote omitted). Finally, respondent acknowledges as well that the theory of "continuing seizure" that he presses has also produced a split in the circuits and is appropriately embraced in the question presented in Officer Jones's petition. See *id.* at 5-7, 16. See also Pet. 14 n.5. Nevertheless, respondent claims that "it does not appear that any circuit would hold that a claim of police frame-up accrues before the favorable termination of the criminal prosecution." Resp. Br. 15 (footnote omitted). He adds, citing *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001), and *Laurino v. Tate*, 220 F.3d 1213 (10th Cir. 2000), that "[t]wo of the circuits which hold that Fourth Amendment claims accrue upon arrest recognize an exception for frame-up cases." *Id.* at 15 n.19.

In fact, the conflict in the circuits cannot be cabined as respondent suggests. In *Nieves*, for example, the plaintiffs alleged that "the officers conspired to deprive [them] of their civil rights by using excessive force, arresting them without probable cause, initiating baseless charges, and maliciously prosecuting those charges." 241 F.3d at 49. Of these claims, the court held that they all accrued immediately upon the plaintiffs' arrest except for the claim of malicious prosecution. See *id.* at 52-53. Thus, the court held that even an alleged conspiracy to bring baseless charges—a claim indistinguishable from the Fourth Amendment claim pressed here—accrued immediately. In *Nieves*, the court held that *Heck* delays the accrual of only malicious prosecution claims; and here, respondent acknowledges that he does not make the claim of malicious prosecution that survived the statute of limitations in *Nieves*. See Resp. Br. 9-11 & n.13.[1]

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[1] To support his very different reading of *Nieves*, respondent cites the court's footnote 4. See Resp. Br. 15 n. 19. In that footnote, however, the court wrote only that "there may be rare and exotic circumstances in

As for the decision in *Laurino*, the Tenth Circuit in that case held that the plaintiff's allegation of a warrantless arrest without probable cause accrued immediately upon his arrest, and not after he was acquitted on the charges for which he was arrested. See 220 F.3d at 1216-17. Respondent endeavors to take comfort from *Laurino*'s footnote 3, which adverts not to the possibility of delayed accrual on a Fourth Amendment claim when there is an alleged "police frame-up" (Resp. Br. 15), but instead suggests that accrual may be delayed while related criminal charges are pending "where all of the evidence to be presented was obtained as the result of an illegal arrest." 220 F.3d at 1217 n.3 (citation omitted). See also *Beck v. City of Muskogee Police Department*, 195 F.3d 553, 559 n.4 (10th Cir. 1999) ("[W]e are not faced with the rare situation . . . where all evidence was obtained as a result of an illegal arrest."). But the circuits are split on whether *Heck* delays accrual even when the plaintiff alleges that all of the evidence against him on a pending criminal charge was derived from an alleged Fourth Amendment violation. In *Datz v. Kilgore*, 51 F.3d 252 (11th Cir. 1995) (per curiam), for example, the court held that a complaint alleging an illegal search of the plaintiff's car accrued immediately under *Heck* even though that search produced all of the evidence used to convict the plaintiff for illegally possessing a rifle recovered in the search. See *id.* at 253 & n.1. Similarly, in *Moore v. Sims*, 200 F.3d 1170 (8th Cir. 2000) (per curiam), the court held that a claim of illegal detention and search accrued immediately under *Heck* even though the plaintiff was convicted for possession of cocaine recovered during the allegedly illegal detention and search. See *id.* at 1171-72. And in *Nieves*, as we explain above, the court concluded that the plaintiffs' Fourth Amendment claims accrued immediately despite an allegation that the arresting

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which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest." 241 F.3d at 53 n.4.

officers conspired to pursue baseless charges. See 241 F.3d at 52-53. In all of these cases, the plaintiffs' allegations, if sustained, meant that all of the evidence against them was produced by a Fourth Amendment violation, and yet in each case the court held that the plaintiffs' claims accrued immediately and not when the related criminal litigation had ended. These cases, however, cannot be reconciled with the decisions in other circuits we discuss in the petition that hold that *Heck* delays accrual whenever a Fourth Amendment claim, if successful, would require the suppression of critical evidence against an accused. See Pet. 7-12. This undeniable conflict in the circuits warrants plenary review, as even respondent ultimately acknowledges. See Resp. Br. 16.

2. Respondent argues that his claim did not accrue while related criminal charges were pending because "a claim of police frame-up," in respondent's view, would "necessarily undermine any conviction." Resp. Br. 15. But this is no different from the rule that *Heck* rejected, which would have barred any action seeking damages that "would resolve a necessary element to a likely challenge to a conviction . . . ." 512 U.S. at 488. As we explain in our petition, *Heck* delays accrual only when favorable termination of related criminal litigation is an element of the civil cause of action at issue, and a favorable termination of a related criminal case is never an element of a Fourth Amendment claim alleging arrest without probable cause. See Pet. 12-13.

Moreover, whatever the merits of respondent's interpretation of *Heck*, it provides no support for the holding of the court of appeals in this case. Under the court of appeals' holding, the claim that respondent can advance permits him to recover damages only between the time of his arrest and the time that he was arraigned on charges. See Pet. App. 6a. Thus, success on that claim would not necessarily establish the invalidity of the charges that were filed against respondent or of a potential conviction on those charges—the

claim that the court of appeals has permitted respondent to make simply does not embrace the course of respondent's prosecution in state court. There is accordingly no necessary inconsistency between the charges that were filed against respondent and the false arrest claim that the court of appeals wrongly held did not accrue until the charges against respondent had been resolved in his favor.[2]

In an effort to make his claim seem dependent on the course of the criminal proceedings against him, respondent denies that his claim is for false arrest and instead characterizes his Fourth Amendment claim as one for "wrongful prosecution." Resp. Br. 9-12. But there is no such thing as a Fourth Amendment "wrongful prosecution" claim. The Fourth Amendment is directed at "unreasonable searches and seizures," U.S. Const. amend. IV, not prosecutions. Indeed, it has long been settled that an arrestee has no right under the Fourth Amendment "to judicial oversight or review of the decision to prosecute." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). Moreover, even if respondent were correct that an arrestee can recover damages for a prosecution undertaken as a consequence of a baseless arrest despite the Seventh Circuit's holding to the contrary (Resp. Br. 11), the fact that a plaintiff's damages continue to mount while the charges against him remain pending is no reason to delay accrual of his cause of action. It is well settled that a cause of action accrues when the plaintiff learns his rights have been

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[2] Respondent faults us for stating that the charges against him had been dropped when respondent now claims to have been found not guilty at a bench trial. See Resp. Br. 1-2 n.4. In fact, the petition accurately describes the allegations in respondent's complaint, which alleged that the charges against respondent were dropped on July 8, 2002. R. 1 ¶ 7. Apparently, respondent's complaint did not accurately describe the disposition of the criminal case against him. In any event, we agree with respondent that the precise manner in which the criminal case against respondent was terminated is of no legal significance to respondent's constitutional claims. See Resp. Br. 1-2 n.4.

violated, and not when the full consequences of that violation are felt. See, *e.g.*, *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam); *Delaware State Teachers College v. Ricks*, 449 U.S. 250, 258 (1980).

Respondent also fails to come to grips with the import of *Nelson*. Respondent claims that *Nelson* does not address "whether a damages action must be brought when the suit, if successful, would undermine a criminal prosecution." Resp. Br. 15. *Nelson* however, explicates the favorable termination requirement of *Heck*, and teaches that this requirement applies only when plaintiffs "challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute," and does not "cut off potentially valid damages actions . . . that could otherwise have gone forward had the plaintiff not been convicted." 124 S. Ct. at 2124. Thus, under *Nelson*, *Heck*'s favorable termination requirement did not delay the accrual of respondent's Fourth Amendment claim. That claim did not challenge the fact or duration of respondent's confinement, nor was it in any way dependent upon respondent's prosecution or conviction. Had Officer Jones released respondent after his allegedly baseless arrest without charges, respondent could immediately have brought a Fourth Amendment claim against Officer Jones, and as *Nelson* makes plain, *Heck* does not "require differential treatment of [an] otherwise cognizable § 1983 claim." *Id.* at 2125. Accordingly, even if the Court denies plenary review in this case, vacatur of the judgment of the court of appeals and a remand to that court for reconsideration in light of *Nelson* is surely warranted.

3. Respondent appears to agree that Officer Jones's petition for a writ of certiorari should be granted, but he argues that his own petition should be granted as well. See Resp. Br. 5, 16. In our brief opposing that petition, however, we explain that respondent's petition (No. 03-1687) raises a number of issues on which there is no conflict in the circuits

and which do not merit plenary review, and the petition is plagued by waiver problems as well. Respondent ignores most of this discussion and confines himself to two observations about his petition.

First, respondent claims that he did not abandon his claim under the Due Process Clause but merely "urge[d] the Seventh Circuit to resolve his claim on Fourth Amendment grounds." Resp. Br. 8 n.11. As we explain in our brief in opposition, however, respondent did more than merely urge multiple theories of liability. Instead, he argued that because his claim was subject to the Fourth Amendment, it would be inappropriate to analyze it under the rubric of due process as well. See Brief for Respondents in Opposition at 8, No. 83-1687. On that score, respondent was correct—in *Albright v. Oliver*, 510 U.S. 266 (1994), a majority of the Court concluded that when an action seeking damages for an allegedly wrongful prosecution describes an unreasonable search or seizure within the meaning of the Fourth Amendment, no alternate theory of liability under the Due Process Clause should be entertained. See *id.* at 274 (plurality opinion); *id.* at 290-91 (Souter, J., concurring in the judgment).

Second, respondent claims that he did not waive below an attack on the Seventh Circuit's limitation on the damages recoverable on a Fourth Amendment claim but merely filed a brief that "accurately described the damages recoverable on a common law false arrest claim." Resp. Br. 11 n.15. Respondent, however, is unable to identify any point in his briefs or argument below in which he advanced the view of Fourth Amendment damages reflected in his own petition for certiorari.

Officer Jones's petition supplies an appropriate vehicle to examine both the application of *Heck* to Fourth Amendment claims as well as the theory of "continuing seizure" that respondent presses. Both of these issues have divided the

circuits, and, as respondent acknowledges, they are both embraced within the question presented in Officer Jones's petition. Respondent's own petition for certiorari, on the other hand, injects additional issues into the case that do not merit plenary review. Thus, while the parties are in agreement that this petition for a writ of certiorari should be granted, there is no reason to inject additional complexity and confusion into this case by granting respondent's petition as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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